Nos. 216 and 328.

IN THE

Supreme Court of the United States

OCTOBER TERM.

SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING, *Petitioner*

v.

THE UNITED STATES.

THE UNITED STATES, *Petitioner*

v.

SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING.

On Writs of Certiorari to the Court of Claims.

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES.

THE SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING,

By GEORGE M. TUNISON,
Counsel for Shoshone Tribe.

CHARLES J. KAPPLER,
ALBERT W. JEFFERIES,
FRANCIS S. HOWELL,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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DATE OF "TAKING".

(1) On page 18 of defendant's brief filed December 10, 1936, counsel state that House Report No. 1628, 69th Congress, 2nd session, dated December 16, 1926, on S. 2301, referred to the Arapahoes as having been "moved" to the

Shoshone reservation in the "winter of 1877-78." In House Report No. 1983, 69th Congress, 2nd session, dated February 4, 1927, on H. R. 16838, being identical with the present Jurisdictional Act, which report was made just a month before the bill S. 5523 was approved by the President, it was stated the Arapahoes had been moved upon the Shoshone reservation in the "fall of 1877." This report says:

> "The principal claim of the Shoshone Indians is based upon the alleged violation by the United States of article 2 of the treaty with the eastern band of the Shoshone Indians concluded at Fort Bridger, Utah Territory, on July 3, 1868. The Shoshone Indian Reservation, by the terms of the treaty, was set apart—
>
> for the absolute and undisturbed use and occupation of the Shoshone Indians herein named, and for such other friendly tribes or individual Indians as from time they may be willing, with the consent of the United States, to admit among them, and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, * * * shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.
>
> This is followed in Article II by the following declaration:
>
> No treaty for the cession of any portion of the reservations herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his right to any tract of land selected by him, as provided in article 6 of this treaty.

> Notwithstanding these specific agreements on the part of the United States and against the protests of the Shoshone tribe, the northern band of the Arapahoes, under military escort, was moved upon the reservation of the Shoshones in the *fall of 1877*. To disarm the Shoshones, they were assured by the military authorities that the Arapahoes would be removed from the reservation the following year, but no such removal ever too place. The Shoshones have frequently protested against the alleged unlawful appropriation of the reservation but have received no consideration from the Government. On the contrary, the Government has not only permitted the Arapahoes to remain upon the reservation but has turned over to them approximately one-half of the lands and provided allotments for them. Funds realized from the sale of lands or otherwise have been placed to the joint credit of the two tribes and the whole reservation and tribal funds treated as though the Arapahoes were legal joint owners with the Shoshones. Such action by Government officials has *at no time been sanctioned by Congress and is without legislative authority.*
>
> The purpose of the bill is to permit the Shoshones to submit their claims *for alleged appropriation of property* to the Court of Claims, and your committee feels that in view of the strong showing made the bill should be enacted without further delay." (Italics supplied.)

If, as contended by defendant's counsel, Congressional reports must be consulted to develop and comprehend the intention of Congress in passing the Jurisdictional Act, it should be here noted that the above report shows that Congress knew that the use of Shoshone lands had been *appropriated* without the sanction of Congress and that the Shoshone title to the lands was to be cancelled, thus bringing the case within the rule of "just compensation"—Act February 8, 1887, 24 Stat. 391. Sec. 10 of that acts reads as follows:

> That nothing in this act shall be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian,

> or a tribe of Indians, for railroads or other highways, or telegraph lines, for the public use, *or to condemn such lands to public uses, upon making just compensation.* (Italics supplied.)

A reservation for Indians is a recognized public purpose: *Alaska Pacific Fisheries* v. *United States*, 248 U. S., 78; *Donnelly* v. *United States*, 228 U. S., 243.

It was found by the Court below that the Arapahoes first appeared on the Shoshone reservation March 18, 1878, "without previous knowledge of the Shoshones (Rec. 46, 47). The Court below found that their coming upon the Shoshone reservation was only temporary, until a reservation at Red Buttes, near the mouth of the Sweetwater, could be prepared for them; that the matter of permanent location was not discussed, the Commissioner of Indian Affairs failing to answer the Agent's letters bearing on the subject (Rec. 46, 47). The statements in the Congressional Reports above quoted although contradictory were intended as a mere general statement concerning the probable time the Arapahoes "moved" upon the Shoshone reservation, and had nothing whatever to do with the actual time of "taking." The Jurisdictional Act provided no time of "taking" (Rec. 77); that was left to the courts to determine if they found there was a "taking". The Court below found matters relating to the location of the Arapahoes in an indefinite state; no one asserted in 1878 that there would be a "taking"; there was no evidence showing the United States had actually appropriated one-half interest in the Shoshone reservation between 1878 and 1891 when on the latter date the letter of the Commissioner clearly indicated that the Arapahoes were to remain on the Shoshone reservation permanently. As the matter of "taking" was wholly indefinite prior to 1891, and the letter of the Commissioner of 1891 being the only official statement indicating an appropriation as of that date (the Arapahoes themselves in 1886 having made inquiry concerning their uncertain status on the Shoshone reservation

Rec. pp. 11, 76), it must be recognized there is color of evidence of attempted "taking" in the 1891 letter, whereas prior to 1891 there is nothing but a maze of indefiniteness and doubt (Rec. 50).

However, petitioner contends the only substantial evidence of actual taking is the act of March 3, 1927, which provided for the cancellation of the Shoshone title in the lands used and appropriated for the benefit of the United States and the Arapahoes.

The Jurisdictional Act for the first and only time, afforded the Shoshones an opportunity to present their constitutional claims for compensation for taking their property for public use. Congress in effect agreed to pay all damages they have suffered on condition that the decree of the court should cancel Shoshones titles to their property claimed by the terms of the treaty. The terms may have been harsh, but just compensation is to be fixed in the damages to compensate. Therefore the presumption is that Congress intended to do justice to its wards and that the courts would award damages that would amount to that just compensation contemplated by the Constitution.

EFFECT OF THE ACT OF 1883.

(2) In reference to the statements of defendant's counsel concerning the intention of Congress in passing the act of March 3, 1883 (Brief, 32, 33), it may be pointed out that Congress as far back as 1871 in the Stockbridge-Munsee case indicated its policy toward the ownership of natural resources on Indian reservations, and such policy, notwithstanding the alleged large amount involved, has been consistently adhered to up to the present. The statement of counsel that Congress was not aware of the effect of the act of 1883 is disproved by the passage of a large number of subsequent acts doing exactly what was provided in the act of 1883. That policy is and no doubt has always been that the United States never intended to deprive the Indians of any part of their patrimony. It was a policy

based on right and justice, and the amount involved had no bearing or influence on Congress in adopting and continuing such policy. It is to be observed that Government counsel in their brief have wholly ignored the legislation of Congress on the subject as set forth by Mr. Attorney General Stone in his opinion and in petitioner's brief.

Counsel for the defendant on page 31 of their brief quote the act of 1883, which provided that the proceeds of all pasturage and sales of timber, coal and other products, should be placed to the credit of Indian tribes; and say on page 32 there was no authority to remove and sell.

The question arises, how could there be sale without removal? This act impliedly gives the Secretary of the Interior power of removal (removal being merely an administrative act), if the Commissioner and the Secretary had no such general authority by virtue of having charge of all Indian affairs, and as guardian of the Indians.

On page 32 counsel say that when the act of March 3, 1883 was passed it was well known Indian reservations contained valuable stands of timber and large and rich mineral deposits, proved later to be worth hundreds of millions of dollars.

Does counsel imply, if such resources were known, that Congress was ignorant of such fact? If Congress was ignorant, then as it had provided in said act the Secretary shall make detail report at its next session it became fully aware of the effects of said act of 1883; still Congress did not repeal said act, but on the contrary at nearly every session passed additional acts confirming the proceeds from the natural resources on Indian reservations in the Indians.

On page 34 counsel state that "it is apparent that Congress did not understand the act of 1883 as conferring upon the Indian tribe any title to the timber, minerals, or other products of the reservation, since by the act of February 16, 1889, it was provided the President might authorize individual Indians residing on reservations to fell, cut, remove, sell or otherwise dispose of the dead timber

standing or fallen for the sole benefit of the individual Indians performing the labor."

The answer to this contention is, that as Congress had recognized the right to the timber, etc., in the Indian tribes, and the tribe under the supervision of the Secretary had the right to the proceeds arising from its sale; nevertheless in order to give employment to individual Indians, and whose individual labor produced the results, Congress considered it wise to encourage such thrift so far as dead timber was concerned. This act of 1889 was merely a subsidiary act to the act of 1883, and in passing it Congress undoubtedly conformed to the wishes of the tribes in the matter. After six years of experience under the act of 1883 Congress must have been aware of the effects of the said act, so reported to it by the President or the Secretary of the Interior. Under the plenary power of Congress over the Indians it had the power to supplement the act of 1883 without the consent of the tribe, but in all these matters it is well known that the Secretary or the Commissioner advises with the tribes before recommending legislation such as the act of 1889.

In 1787 it was ordained by the United States in Congress assembled, That—

> "The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them." (1 Stat. 52—4 Kappler, 1065.)

No instance can be cited by defendant's counsel where the Congress ever attempted to take for the use and benefit of the United States any natural resource located or found

on the lands of any Indian treaty reservation without adequate compensation therefor. In every instance, so far as counsel for the Shoshones are aware, Congress conceded to the Indians every element of value on such reservations, and has never gone to the extent of claiming by reason of its sovereign pre-emption right to purchase that such right of purchase included ownership of the land or the natural resources above and below the surface thereon. If the United States as the holder of the naked fee, or as Chief Justice Marshall said, as the holder of "the exclusive right of purchasing such lands as the natives were willing to sell", owned every element of value on such reservations outside of use and occupation, then Congress has never asserted such rights of ownership. All that Congress has reserved to itself is the right to say when and to whom said natural resources shall be disposed of, and to see the Indians are not overreached; and it acquired this right because of its sovereignty and as the guardian and trustee for the Indians, and also to see that "the sale of the land is not made to any other Governments or their subjects" (*Holden* v. *Joy*, 17 Wall. 211, 244). All these attributes of power and supervision over the Indians lodged in the United States are not inconsistent with the beneficial ownership of all elements of value contained within their reservation boundaries being in the Indians.

The United States has exacted its consent to the removal and disposal of natural resources on Indian reservations, as general guardian of the Indians, not only as to reservations in which the Indians held the usual Indian title, but also as to reservations where the Indians held a fee simple title. Congress has passed many acts governing the removal, sale and disposal of the natural resources on the reservations of the Five Civilized Tribes (32 Stat. 641) and other tribes holding their lands by patent. In this respect Congress has not distinguished between the nature of titles held, and in no instance so far as is known has Congress claimed any ownership whatever in the natural resources

of either kind of reservations. Congress has plenary power over the tribal property of the Indian tribes, which as interpreted by Congress itself, includes lands and resources. Such interpretation is conclusively shown by the many general and special acts enumerated in the appendix to petitioner's brief, pages 75, 76. These acts and the early treaties mentioned by Mr. Attorney General Stone in his Opinion cited on pages 65-68 of petitioner's brief, clearly indicate that the beneficial ownership of the natural resources on Indian reservations exists and always has existed in the Indians, and the acts and treaties above referred to are simply reaffirmations of such beneficial ownership. All that the Congress ever claimed was its stewardship over the property of the Indians; it has never asserted the right to go upon such reservations and denude their resources for the benefit of the United States; it has always adhered to the declaration enunciated in the Ordinance of 1787, above quoted, and all its acts since that declaration has been to the effect that the United States neither claims nor seeks profit at the expense of the Indians.

In the earlier days when the intention of Congress regarding the property rights of Indians in their reservation lands had not been fully expressed, this Court said:

> *Leavenworth R. R. Co.* v. *United States*, 92 U. S. 733-742:
>
> "In the exercise of their choice, they (Indians) might occupy their lands forever."
>
> *Lone Wolf* v. *Hitchcock*, 187 U. S., 554:
>
> Indian possession has always been recognized as complete and conclusive until terminated by conquest or by the exercise of that plenary power of guardianship to dispose of tribal property of the Nation's wards without their consent.
>
> *Holden* v. *Joy*, 17 Wall. 211-244:
>
> Unmistakably their (Indian) title was absolute, subject only to the preemption right of purchase acquired

by the United States as the successors of Great Britain and the right to prohibit the sale of the lands to any other governments or their subjects.

Mitchel v. *United States*, 9 Pet. 756—15 Pet. 84:

The right of the Indians to their lands is not that of mere occupancy and perpetual possession, but a right of property held under the guaranty of treaties.

Fellows v. *Denniston*, 5 Wall. 761:

It has already been shown that the United States have acknowledged the reservations to be the property of the Seneca Nation—that they will never claim them nor disturb this nation in their free use and enjoyment, and that they shall remain theirs until they choose to sell them. These are the guaranties given by the United States, and which her faith is pledged to uphold.

The Shoshone Indians, always the staunch friend and ally of the United States, place their hope in this Court to declare, in view of the consistent policy of Congress towards the Indians in reference to the ownership of the natural resources on Indian reservations, that they are and always have been, but particularly since the making of their treaty in 1868, the owners of the soil and resources embraced within their reservation boundaries, subject to the right of the United States to purchase and to act as trustee for the tribe.

GRATUITIES.

(3) Defendant's counsel on page 37 of brief are now for the first time attempting to show that any money received by the Shoshones from the proceeds of the sale of natural resources on their treaty reservation under the act of 1883, are reimbursable to the Government under "gratuities" allowed to be set-off by the Jurisdictional Act. No such novel proposition was advanced in the Court below. Such

a contention is contrary to the intention of Congress as expressed in Indian jurisdictional acts as well as in enunciations by the courts.

In the Fort Berthold case, decided Dec. 1, 1930, 71 Ct. Cl. 308, Chief Justice Booth said:

> "The sums chargeable, we think, must be restricted to the usually recognized and customary distributions made to the Indians as tribes and bands, unless a contrary purpose is expressed in the act."

In the Blackfeet case, the Court of Claims said:

> We are of the opinion that in this case it was the intent and purpose of Congress to charge the plaintiffs with all sums disbursed for their benefit over and above those provided for in treaty or other obligations. (81 Ct. Cl. 101.)

Counsel for the Government in Indian cases before the Court of Claims, have defined gratuities to be all sums advanced or expended by the United States from the Treasury for the benefit of the Indians, although under no obligation to do so; and this definition has been adopted by the Court of Claims. (81 Ct. Cl., 268.)

For Congress or the courts to say that money arising from the removal and sale of natural products on Indian treaty reservations when Congress has expressly provided such money should be placed to the credit of the Indians or expended for their benefit, same not being United States funds, is a set-off would make the repeated declarations to treat the Indian fairly and justly a hollow mockery; and as stated by the Court of Claims in *White River Utes* v. *The United States,* "Certainly no such claim would ever be made against any people other than Indians." (45 Ct. Cl., 440.)

As stated by this Court in *Choctaw Nation* v. *The United States,* 119 U. S., 1—

"The parties are not on an equal footing and that inequality is to be made good by the superior justice which looks only to the substance of the right without regard to technical rules."

INCONSISTENCIES OF DEFENDANT'S COUNSEL.

(4) It is striking to note that present counsel for the defendant have practically abandoned defenses set up in the Court below as well in their brief in support of petition for certiorari in this Court, and are now seeking to raise entirely new defenses.

In the court below counsel did not attack the wording of the Jurisdictional Act, nor contend that parts of it were ambiguous. Now counsel are attempting to show this Court by quoting (brief, pp. 20-23) certain words Congress omitted in Section 3 thereof which were contained in the earlier bill, namely S. 2301, that an ambiguity was created by such omission as to what Congress intended, overlooking the fact that the first section of the Jurisdictional Act as approved confers complete jurisdiction upon the Court of Claims, and on appeal to the Supreme Court, to adjudicate the claims of the Shoshone Indians against the United States and to render judgment therein. While it may be admitted that Congress might have added additional words to Sec. 3, such as "so appropriated" at the end of Sec. 3, notwithstanding such words are plainly inferred, to meet the critical objection raised by counsel, nevertheless when Section 1 and 3 are read together, it will be seen that the intention of Congress was plain, namely: that in the event of judgment, the damages awarded and paid thereunder shall annul and cancel all claim, right and title of the said Shoshone Indians in and to the lands or property appropriated by the United States.

In any event, should there be doubt as to the intention of Congress, this court in *Choate* v. *Trapp,* 224 U. S., 665, has said:

"Doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor

> of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years, and has been applied in tax cases."

Also see *Alaska-Pacific Fisheries* v. *United States*, 248 U. S. 78-89.

Reference is here made to the Jurisdictional Acts in the case of the Iowa Tribe of Indians, approved April 28, 1920 (41 Stat. 585), and the case of the Fort Berthold Indians, approved February 11, 1920 (41 Stat. 404), in both of which cases the Court of Claims rendered judgments in favor of the Indians under the first section contained in both acts, which first section is nearly identical with the first section of the Shoshone Act. (68 Ct. Cl., 585; 71 Ct. Cl., 308.)

In the Court below defendant made its defense on the theory that the Shoshone Indians had consented to the admission of the Arapahoes amongst them, and had surrendered to the Arapahoes one-half interest in their treaty reservation without consideration. Abandoning this contention in this Court, they now say in the cross-petition, pages 10-11:

> "Those in charge of Indian Affairs *thought* they had the consent of the Shoshones to the removal of the Arapahoes for permanent settlement on the Shoshone reservation;"

and upon such "thought" counsel claim the date of "taking" was in 1878.

In the Court below and in the cross-petition here, defendant contended that Congress, by passing appropriations for the support of the Arapahoes, had recognized the taking of Shoshone lands. In the brief filed December 10, this position is abandoned.

In this brief, counsel for defendant abandon the above defenses, and boldly assert that the "taking" was in 1878,

basing their claim on a Congressional report which merely recited "that the northern band of the Arapahoes, under military escort, were moved upon said reservation in the winter of 1877-78" (brief, page 18); that the Jurisdictional Act is ambiguous or meaningless (p. 29); that the Jurisdictional Act was "an offer to purchase," or "an offer to contract" (pp. 20, 28) and then say that the Jurisdictional Act provided "only a forum" (p. 26); that "the bill undertook to fix the compensation to be paid," (p. 23) whereas the Act left that function to the Courts; that money arising from sale of natural resources from the Shoshone reservation and placed to the credit of or expended for their benefit as authorized by Congress, is a set-off as a gratuity; and that the Court below found no actual damages to the Shoshones notwithstanding it found the United States had deprived the Shoshones of one-half interest in their reservation, fixed the value thereof, and awarded judgment.

This Court has met such a change of front and inconsistency in its opinion written by Mr. Justice Holmes in *International Paper* v. *The United States*, 282 U. S., 399, as follows:

> "The Government has urged different defenses with varying energy at different stages of the case. The latest to be pressed is that it does not appear that the action of the Secretary was authorized by Congress. We shall give scant consideration to such a repudiation of responsibility."

Respectfully submitted,

THE SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING,

By GEORGE M. TUNISON,
Counsel for Shoshone Tribe.

CHARLES J. KAPPLER,
ALBERT W. JEFFERIES,
FRANCIS S. HOWELL,
Of Counsel.